EXHIBIT C

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U.S. DISTRICT COURT
N.D. OF ALABAMA

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

THE BANK OF NEW YORK MELLON, et al.,	)	
Plaintiffs,	)	
v.	)	Case No.: 2:08-CV-01703-RDP
JEFFERSON COUNTY, ALABAMA, et al.,	)	
Defendants.	)	

THE COUNTY'S RESPONSE BRIEF IN OPPOSITION TO PLAINTIFFS' EMERGENCY MOTION FOR APPOINTMENT OF A RECEIVER

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INTRODUCTION

Jefferson County and the elected officials serving on the County Commission (collectively, the "County"), by and through their undersigned counsel, hereby respond to Plaintiffs' Post-Hearing Brief (Doc. # 86).

INITIAL STATEMENT

Plaintiffs' most recent brief can be summarized by quoting a line from its introduction: "Plaintiffs trust that with more time to consider the gravity of the situation, the Court will agree it has jurisdiction and possesses full power to appoint a receiver over the System who will function as the Commission with respect to the System." (Doc. # 86 at 1). The mere passage of time, however, cannot stand in for sound legal argument and Plaintiffs have done nothing in the interim to improve on the contentions they have already pressed without success.

Passage of time is apparently the best argument Plaintiffs have. The evidence is squarely against them. That evidence received on March 26, 2009 clearly shows that the County is taking or has already taken the remedial steps proposed by the Special Masters. The evidence shows no waste or fraud. The evidence reveals significant doubts about Plaintiffs' alleged events of default. Most importantly, the evidence shows a political process – and politically-accountable public servants – fully engaged in crafting a solution to a difficult problem.

At the end of the day, Plaintiffs have simply "doubled-down" on their earlier arguments. They deny that the Johnson Act applies to this suit – but they have no argument that the Court has not already rejected. They deny that abstention is proper – but they have no new reasons why. They assert that they will be irreparably harmed without an immediate receiver – but they ignore the fact that the Court has taken ratemaking off the table. Assuming that the Court stands by its reasoned judgment that there are jurisdictional and jurisprudential obstacles to a federal court deploying its equitable powers to superintend Jefferson County's political apparatus,

Plaintiffs are left with no explanation as to why they need a receiver. All Plaintiffs want is ratemaking power, but they cannot get it – at least not from this Court.

ARGUMENT

None of Plaintiffs' arguments withstands scrutiny. The County will address each in turn. First, the County will deal with Plaintiffs' after-the-fact attempt to circumvent the Johnson Act's clear prohibition. Second, the County will show that, even if this Court had jurisdiction, abstention would be proper. Third, the County will put to rest Plaintiffs' baseless charge that denying the emergency motion will cause the sky to fall. Fourth, the County will address Plaintiffs' evidence and explain why it is insufficient to carry Plaintiffs' heavy burden under the federal receivership standard. Fifth, the County will show that Plaintiffs' must post a bond. Finally, the County will briefly demonstrate how Plaintiffs continue to assert misleading allegations of defaults to confuse and distract the Court from the real issues at hand.

I. The Johnson Act Precludes the Relief Plaintiffs Request.

Before considering the particulars of Plaintiffs' Johnson Act argument, it is worth noting how often Plaintiffs have changed positions concerning the would-be receiver's powers. At the February hearing, Plaintiffs stated unequivocally that "receivership is meaningless until the receiver is empowered to raise revenue and cut expenses." (Tr. of 2/25 Hearing at 11). That "ratemaking receiver or bust" argument led the County to invoke the Johnson Act. (Tr. of 3/25 Hearing at 4-5). At the March hearing, however, Plaintiffs (presumably in response to Johnson Act resistance) reversed course and stated that a receiver who could not affect rates would be agreeable. (Tr. of 3/25 Hearing at 11). Having "look[ed] at [the arguments] pretty carefully" (*id.* at 96), the Court made clear at the March hearing that the case was going to proceed "with the understanding that if a receiver is appointed, the receiver will not have the power to affect rates." (*Id.* at 95). The Court further emphasized that its position was "more than [an] inclination." (Tr.

of 3/26 Hearing at 263). Now, heedless of the Court's determination, Plaintiffs have seemingly returned to their February-hearing mindset and are bulling ahead with their demand for a ratemaking receiver; there is no hint in Plaintiffs' brief that a *non*-ratemaking receiver would be worth the expense such a receiver would entail. (*See* Doc. # 86 at 3). Plaintiffs' "new" arguments are not new at all. They are the same arguments – the same end run around the Johnson Act – that this Court has already rejected. Nothing has changed in the last month to invest Plaintiffs' contentions with force. They were wrong in March; they are wrong now.

A. Plaintiffs' Threshold Efforts To Evade The Johnson Act Are Unavailing.

1. The Johnson Act Applies Because Plaintiffs' Requested Relief Would "Affect" the Sewer Use / Pretreatment Ordinance.

As the County made clear in its principal post-hearing brief (*see* Initial Brief at 2), the relevant "order affecting rates" for Johnson Act purposes, *see* 28 U.S.C. § 1342, is the Sewer Use / Pretreatment Ordinance (the "Ordinance"). Any ratemaking receiver would necessarily interfere with the operation of the Ordinance because it is in the Ordinance that the County fixes sewer rates (including volumetric rates, fees, charges, etc.).

Time and again in their brief, Plaintiffs assert that the Johnson Act does not apply because they are not frontally "challeng[ing]" or asking the Court to "enjoin" any rate order *per se*. (*See*, *e.g.*, Doc. # 86 at 1, 6, 7, 8, 9, 10, 11, 12, 15, and 18). That, of course, is *precisely* the argument that Plaintiffs made – and that this Court rejected – at the March 25 hearing. (*See* Tr. of 3/25 Hearing at 19-21). The argument in no more persuasive now than it was then. There are several critical problems.

First, Plaintiffs have misstated the applicable test. As the County explained at the March hearing, "[a] frontal challenge to a rate order is not what triggers the Johnson Act." (Tr. of 3/25 Hearing at 42). Nor, as the Court correctly observed (*see id.* at 18-19), does the Johnson Act

narrowly forbid enjoining rates. Rather, the Act "has been broadly construed to prohibit federal court actions that indirectly as well as directly affect rate orders." *Carlin v. Southern Bell Tel. & Tel. Co*., 802 F.2d 1352, 1356 (11th Cir. 1986); *accord, e.g.*, *U.S. West Inc. v. Tristani*, 182 F.3d 1202, 1207 (10th Cir. 1999) (Act "'broadly applied'" to prohibit "'challenges to orders affecting rates'" (quoting *Hanna Mining Co. v. Minnesota Power & Light Co*., 739 F.2d 1368, 1370 (8th Cir. 1984)); *Brooks v. Sulphur Springs Valley Elec. Coop.*, 951 F.2d 1050, 1053-54 (9th Cir. 1991) (Act "broadly construed" to bar "'all challenges affecting rates'" (quoting *Miller v. New York State Pub. Serv. Comm'n*, 807 F.2d at 28, 31 (2d Cir. 1986)). Under this "effects test," the Act is inapplicable only when "the relief [the plaintiff] seeks, if granted, would not in any way affect the rates established" by the ratemaking authority. *Carlin*, 802 F.2d at 1356.[1] Because Plaintiffs' requested relief portends *at least* an "indirect[]" effect on County sewer rates as set in the Ordinance, the Johnson Act applies and divests this Court of the power to grant that relief.

Second, in every real sense, Plaintiffs' suit *is* a "challenge" to the Ordinance. Plaintiffs' argument to the contrary – which relies on a distinction between *the Court* interfering with the operation of the County's sewer rate and *the Court's appointed receiver* interfering with the operation of the County's sewer rate – is pure formalism. The appointment of a receiver is an equitable remedy in the nature of an injunction. *Ferguson v. Tabah*, 288 F.2d 665, 675 (2d Cir. 1961) ("[A]n order appointing a receiver is injunctive in nature …"). And any receiver would act with the Court's power, regardless of whose shoes he wears. Most importantly, Plaintiffs have made clear – both at the February hearing and now again in their post-hearing brief – that the whole point of getting a receiver is to effect a rate change. The Court's exchange with Plaintiffs' counsel at the March 25, 2009 hearing is instructive on this point:

[1] Both Plaintiffs' demotion of *Carlin* to a footnote and their repeated refusal to engage the "effects test" that *Carlin* embodies (consistently with every other court of appeals to address the issue) are telling. (*See* Doc. # 86 at 10 n.13).

Plaintiffs' Counsel:	"We're not asking you to enter an order to set a rate or affect a rate…."
The Court:	"You're asking me to appoint a receiver to set a rate and affect a rate."
Plaintiffs' Counsel:	"That's right."

(*Id.* at 18-19; *see also* Tr. of 3/25 Hearing at 36-38). Those are Plaintiffs' own words. They made the very same argument – resting on the very same distinction – in their brief: "In appointing a receiver, the Court would not be enjoining a rate order, because the Court would not be changing rates, the receiver would." (Doc. # 86 at 8). Plaintiffs' argument is tantamount to an admission that they are asking the Court for the kind of relief the Johnson Act forbids.

The Fifth Circuit's *Mississippi Power & Light* decision does not help Plaintiffs. In that case, the court specifically "disregarded" any dispute about the rates being charged. *Mississippi Power & Light Co. v. City of Jackson*, 116 F.2d 924, 925 (5th Cir. 1941). In doing so, the court emphasized that "[t]he allegations as to rates instituted by the plaintiff are not necessary to the tendered issue, *no relief is asked as to them* …." *Id.* (emphasis added). Whatever *Mississippi Power & Light* might suggest about the Johnson Act's applicability to a declaratory judgment action that did not focus on rates, it is irrelevant here because this case is admittedly driven by Plaintiffs' demand for an emergency *ratemaking* receiver. (*See* Doc. # 86 at 3). Plaintiffs cannot paper over the centrality of rates to their requested relief.[2]

2. The Johnson Act Most Certainly Applies to "Cases Like This."

Plaintiffs next assert that the Johnson Act was not meant to apply to this type of action. (*See* Doc. # 86 at 4-6). Again, this is just a repackaged version of an argument Plaintiffs have made unsuccessfully already. (*See* Doc. # 79 at 3-4 n.7). As this Court has observed (Tr. of 3/25

[2] Note also that Plaintiffs' overbroad reading of *Mississippi Power & Light* conflicts with the Eleventh Circuit's own more recent – and more pointed – statements in *Carlin* and *Marshall County Bd. of Education v. Marshall County Gas District*, 992 F.2d 1171 (11th Cir. 1993).

Hearing at 16), the Act applies by its plain terms: "The [Johnson] Act is not framed in terms of plaintiffs, whether municipalities, state commissions, utilities or consumers, but in terms of enumerated conditions." *Tennyson v. Gas Serv. Co*., 506 F.2d 1135, 1138 (10th Cir. 1974). Because, as explained below, the "enumerated conditions" apply here, the Act applies as well.

Plaintiffs' arguments to the contrary misfire badly. First, Plaintiffs are clearly incorrect when they assert (*see* Doc. # 86 at 5, 10, n.13) that the Johnson Act applies only to *constitutional* challenges to rate orders. By its unambiguous language, the Act applies to any action in which "[j]urisdiction is based solely on diversity or repugnance of the order to the Federal Constitution." 28 U.S.C. § 1342(1). The Act therefore applies equally to constitutional challenges and to diversity-based cases like this one.

Second, Plaintiffs argue vaguely (*see* Doc. # 86 at 4) that the Act's "origins and purpose" support their assertion that the Johnson Act is inapplicable here. In that connection, however, Plaintiffs pin their hopes entirely on a single, unpublished District Court opinion from the Southern District of New York. (*See* Doc. # 86 at 4-6, (citing *Mun. Elec. Utils. v. Power Auth. of N.Y.*, 1981 U.S. Dist LEXIS 9617 (S.D.N.Y. Apr. 15, 1981))).[3] In cobbling together their intent-based argument, Plaintiffs conspicuously ignore not only the plain language of the Act, but also what the Eleventh Circuit has said about the congressional purpose underlying the Act: "[T]he unambiguous language of the statute expresses Congress' intent that federal courts should not interfere with a state's control over public utility rates." *Marshall County Bd. of Educ. v. Marshall County Gas Dist.*, 992 F.2d 1171, 1176 n.10 (11th Cir. 1993) (stating also"[c]hallenges to public utility rates are matters for state courts"). Moreover, contrary to Plaintiffs' assertion, the Act's full legislative history confirms Congress's hands-off policy towards state and local

[3] To the extent Plaintiffs' rely on the holding of *Municipal Electric Utilities* – and, in fairness, they apparently do not – its holding is in direct conflict with *City of Monroe v. United Gas Corp.*, 253 F.2d 377, 379 (5th Cir. 1958).

ratemaking: "[T]he Congressional debate makes clear that the aim of Congress was to remove completely the subject of utility rates from the federal courts." *Miller*, 807 F.2d at 32 (detailing legislative history). Indeed, "[l]egislators on both sides of the debate spoke of the Act as completely withdrawing rate cases from federal jurisdiction." *Brooks*, 951 F.2d at 1054 (same).

Of course, even if Plaintiffs' intent-based argument held water, their requested relief would nonetheless be barred. Plaintiffs' action is not meaningfully different from an action brought by a utility challenging a rate, which Plaintiffs freely admit would be covered. (*See* Doc. # 86 at 4). Plaintiffs, as purported warrantholders, have a claim on the net revenues of the sewer system – *i.e.*, they can receive as payment only the money that is left after paying the System's expenses out of its revenues. Plaintiffs have brought this suit specifically to try to increase the revenue stream – the rates – so that there will be more revenue to pay the warrants they purport to hold. As a functional matter, their suit is no different from a utility demanding a higher rate in federal court in order to cover its costs or to receive a higher profit. Plaintiffs cannot do indirectly what they admit the Johnson Act would prohibit a litigant to do directly.

B. Plaintiffs' Arguments Concerning The Individual Johnson Act Factors Are Unavailing.[4]

1. Plaintiffs' Current Attempt To Deny That Their Claim Is Based on Diversity Is Disingenuous.

In arguing that this Court's jurisdiction is not based solely on diversity, *see* 28 U.S.C. § 1342(1), Plaintiffs invoke (as they did at the March hearing (Tr. of 3/25 Hearing at 23-24)) the Consent Decree. With respect, Plaintiffs are whistling past the graveyard. For two very basic reasons, Plaintiffs' attempt to press the Consent Decree into service is unavailing.

[4] Plaintiffs do not dispute that the Act's "reasonable notice and hearing" condition, *see* 28 U.S.C. § 1342, is satisfied here.

First, by their own admission, Plaintiffs are *not* seeking the emergency appointment of a receiver under the Consent Decree. Plaintiffs conspicuously fail to acknowledge their express stipulation – entered less than a month ago in connection with the very emergency motion now under review – that "[a]t this time, the Plaintiffs are not asserting that a receiver is necessary to ensure the sewer system's compliance with the Consent Decree or Clean Water Act." (Doc. # 75 at 12, ¶ 97). In the same document, Plaintiffs also agreed that the Court's jurisdiction had been invoked in diversity. (*See id.* at 29,¶ 3). These stipulations echo Plaintiffs' November 2008 admission that they "are not seeking to enforce the terms of the Consent Decree." (Doc. # 32 at 16 ¶ 147 (Plaintiffs' position)). Given Plaintiffs' repeated stipulations – none of which Plaintiffs so much as mention – it is scarcely debatable that Plaintiffs' invocation of the Consent Decree has no place in the consideration of the Emergency Motion.

Second, Plaintiffs' abandonment of the Consent Decree (at least for present purposes) follows straightaway from their implicit acknowledgement that they lack standing to enforce the Decree – and that, even if Plaintiffs had standing, there in any event is no allegation that the County is not complying with the Decree. Ever since the County demonstrated in earlier briefing that Plaintiffs lack standing to enforce the Consent Decree, (*see* Doc. # 11 at 26-28; Doc. # 31 at 20), Plaintiffs have never once attempted a rebuttal. In their November 2008 brief, Plaintiffs declined "to debate their standing to enforce the Consent Decree." (Doc. # 34 at 19-20 n.30). In their March 2009 brief – and now again in their post-hearing paper – Plaintiffs were conspicuously silent with respect to standing. (*See* Doc. # 74 at 18-21 (discussing federal law but ignoring the Consent Decree); Doc. # 86 at 13-15 (discussing "jurisdiction" but never mentioning standing). And with good reason. There is *no* theory under which the Plaintiffs in this case have the requisite stake in the quality of Jefferson County's water supply to sue on the

Consent Decree – let alone seek an emergency receiver based on it. *See*, *e.g.*, *Summers v. Earth Island Institute*, 129 S.Ct. 1142, 1149 (2009) (plaintiff must demonstrate sufficient stake "'to warrant his invocation of federal-court jurisdiction'" (quoting *Warth v. Seldin*, 422 U.S. 490, 498-99 (1975)) (emphasis added in *Summers*).

Plaintiffs' standing, moreover, is doubly tenuous. Not only can they claim no stake in Jefferson County's water quality, but they have not – and cannot – allege that the County has violated the Consent Decree. By contrast, they admit (as they must) that "[a]t this point, the County is in compliance." (Tr. of 3/25 Hearing at 23). To avoid this obvious problem, Plaintiffs state that the County's actions "*threaten the prospect* that the County can continue to abide by the Consent Decree" and that "the County's defaults under the Indenture, unless cured, *may well* make current and future compliance impossible." (Doc. # 79 at 8, 9; Doc. # 86 at 14-15) (emphasis added). But none of those speculative allegations entails the sort of imminence required under Article III. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992); *Elend v. Basham*, 471 F.3d 1199, 1205 (11th Cir. 2006). Plaintiffs are asking for emergency relief on the basis of an agreement to which they are *not* parties and of which the County is *not* in violation. Plaintiffs' lack of standing is patent; their contention based on the Consent Decree should be dismissed.[5] The Decree *cannot* provide the basis for the relief that Plaintiffs request – namely, the appointment of an emergency receiver to protect their alleged interests under the Indenture.

Plaintiffs' late-breaking invocation of the Consent Decree – without mention of their own express stipulations and implicit concessions regarding standing – should be seen for what it is: a transparent attempt to evade the Johnson Act's express prohibition.

[5] To the extent that the Court is concerned about the viability of Plaintiffs' purported Consent Decree claim, the County hereby moves to dismiss that claim for lack of standing. Though the County believes its current briefing is sufficient to show that Plaintiffs have no standing and that no violation of the Consent Decree has occurred, the County is willing to brief the issue on any schedule the Court finds appropriate.

2. Plaintiffs' Argument That The Ordinance Interferes With Interstate Commerce is Misguided.

Plaintiffs seem to fundamentally misunderstand the Johnson Act's "interstate commerce" condition, which requires a finding that the relevant "order does not interfere with interstate commerce." 28 U.S.C. § 1342(2). Indeed, Plaintiffs' interstate-commerce argument is two steps removed from the Act's plain language. First, Plaintiffs contend now, as they did at the March 25 hearing, that the condition fails so long as there exists some "effect" on interstate commerce in the *Wickard v. Filburn,* 317 U.S. 111 (1942), sense – *i.e.*, so long as Congress could plausibly regulate under its Commerce Clause power. (*See* Doc. # 86 at 15-17 ("affects," "effect," "implicates")). But we are aware of no case – and Plaintiffs have cited none – construing the Act's interstate-commerce condition so broadly.[6] Rather, as we have already explained (Tr. of 3/25 Hearing at 32-34), and as Plaintiffs have not meaningfully disputed, the Act's interstate-commerce condition is concerned not with interstate "effects" in the *Wickard* sense, but rather with interstate discrimination and burdens in the *dormant* Commerce Clause sense. Indeed, according to leading commentators, the interstate-commerce condition serves the limited purpose of carving out dormant Commerce Clause challenges from the Act's broad prohibitive scope. *See* R. FALLON, ET AL., HART & WECHSLER'S THE FEDERAL COURTS & THE FEDERAL SYSTEM 1172 (5th ed. 2003); *accord* 17 A. WRIGHT, A. MILLER, ET AL., FEDERAL PRACTICE & PROCEDURE § 4236, at 234 (2d ed. 1997) (noting that interstate-commerce condition is "of doubtful meaning and limited importance").[7]

[6] Indeed, on Plaintiffs reading, it is difficult to imagine a utility rate order to which the Johnson Act would *ever* apply. Every rate order will presumably always have some "effect" on interstate commerce. Plaintiffs' loose construction of the interstate-commerce condition, therefore, would take an Act that all must agree was fundamentally intended to get federal courts *out* of the local ratemaking business and reconceptualize it so as to put them *right back in the middle of it*.

[7] Under existing case law, a local utility's rate order "interfere[s] with" interstate commerce only where (1) the order purports to regulate in a field preempted by Congress, *see Pub Util. Comm'n of Ohio v. United Fuel Gas Co.*, 317

Second, Plaintiffs do not even consider whether the relevant "order" – here, the Ordinance – *itself* interferes with interstate commerce. Instead, Plaintiffs focus exclusively on the arguably interstate aspects of the current litigation. So, Plaintiffs say, the Insurers and underwriters are "located outside of Alabama," and the Warrantholders "represent people and entities from around the country and world." (Doc. #86 at 15). Plaintiffs likewise stress that "this case" has "received national press coverage." (*Id.*) But Plaintiffs never make any effort to tie their argument back to the Johnson Act's text – because they cannot. Under the Act, what matters is whether the "order" – not some larger piece of litigation, but the *order itself* – interferes with interstate commerce. Plaintiffs have not even addressed that question, let alone provided a convincing answer to it.

With respect to the controlling question here – whether the "order" itself (as opposed to the case writ large) "interferes with" (as opposed to merely "affects") interstate commerce, the answer is clear. The Ordinance applies only to the Jefferson County sewer system, which is contained entirely within Alabama's borders and serves only Alabama residents. On similar facts, courts have found that local utility rate orders do not "interfere with" interstate commerce within the meaning of the Johnson Act. *See Kalinsky v. Long Island Lighting Co*., 484 F. Supp. 176, 178 (E.D.N.Y. 1980); *South Cent. Bell Tel. Co. v. Pub. Serv. Comm'n of Kentucky*, 420 F. Supp. 376, 377-78 (W.D. Ky. 1976). The County cited *Kalinsky* and *South Central Bell* to the Court during the March hearing. (Tr. of 3/25 Hearing at 34). Plaintiffs, conspicuously, have made no effort to deal with them.

U.S. 456 (1943); or (2) the order applies to a commodity that has itself been shipped in interstate commerce and does so in a way that would discriminate against or burden the interstate shipment of that commodity, *see Nucor Corp. v. Nebraska Power Dist.*, 891 F.2d 1343 (8th Cir. 1989).

3. Plaintiffs' Attack on Alabama's Plain, Speedy, and Efficient State-Law Remedy Fall Flat.

Plaintiffs have an adequate remedy available to them in state court: They can (as they could have eight months ago) file a lawsuit in state court requesting the same relief they have requested here. They can seek contract damages and, more importantly for present purposes, they can seek a receiver, *see* Ala. Code § 6-6-620 *et seq.* Plaintiffs' state-court remedy is materially identical to their federal-court remedy.

In truth, Plaintiffs do not complain about the adequacy of their remedy *per se*. They tacitly concede (as they must) that a breach of contract action is "plain" and that litigating novel questions of Alabama law in Alabama courts is "efficient." Plaintiffs' argument rests entirely on an *assumption* that the particular state court in which they would file would be insufficiently "speedy." Plaintiffs' "plain, speedy, and efficient" argument fails for multiple reasons.

First, Plaintiffs complain about a perceived lack of dispatch with which they presume the Jefferson County Circuit Court would act on their claims. Even granting all of Plaintiffs' assumptions about how state-court proceedings might unfold – more on that below – Plaintiffs have not shown a lack of "speed[]" in the Johnson Act sense. As the County pointed out at the March hearing (Tr. of 3/25 Hearing at 44-45), the Supreme Court has held in a Tax Injunction Act[8] case that a delay of even years, while "regrettable," does not render a state court insufficiently "speedy." *Rosewell v. LaSalle Nat'l Bank*, 450 U.S. 503, 518-20 (1981). Every case is different, of course, but Plaintiffs' failure even to mention – much less attempt to distinguish – *Rosewell* is telling. Plaintiffs are complaining about the prospect of a six-month delay; the Supreme Court seemed altogether untroubled by a delay four times that long.

[8] The Tax Injunction Act, 28 U.S.C. § 1341, and the Johnson Act are companion provisions, and cases interpreting one are often cited as authority with respect to the other. *See*, *e.g.*, *California v. Grace Brethren Church*, 457 U.S. 393, 410 n.22 (1982).

Second, although Plaintiffs purport to be concerned about the speed with which a state court might act, the question remains: Relative to what? If this Court grants Plaintiffs' emergency motion, the County will have an immediate appeal as of right to the Eleventh Circuit. *See* 28 U.S.C. § 1292(a)(2). That appeal, realistically, would take at least six months. Of course, the losing party in the Eleventh Circuit would presumably petition the United States Supreme Court for certiorari; that process would likely add another six months to the litigation (and a good bit more if cert were granted). Should either the Eleventh Circuit or the Supreme Court agree with the County, on either Johnson Act or abstention grounds, Plaintiffs will end up right back where they should be now – in state court. And, even if Plaintiffs were to prevail throughout the appellate proceedings, once the case returned to this Court, it would *still* be in its infancy.[9] The basic point is this: Plaintiffs seem to fear that state-court litigation will be slow. It will almost *certainly* not be as slow as litigation in federal court.

Third, it must be remembered that it was Plaintiffs who chose to sue in federal court. Had they sued in state court in September 2008 – as they clearly could have – the case would be well underway by now.[10] Having chosen the federal forum, they must take that forum as they find it, jurisdictional obstacles and all. Plaintiffs, as masters of their prayer for relief, cannot now lay the blame at the County's feet for having raised a jurisdictional defect when it did. (*See* Doc. # 86 at 18). Plaintiffs have a responsibility to seek relief that a federal court is allowed to give.

[9] To be sure, for all the activity on Plaintiffs' emergency motion, this case has barely progressed past the pleadings. There has been no parties' planning meeting, no scheduling order, only limited discovery, no dispositive motion schedule, and no trial date set.

[10] Whether a state court remedy is plain, speedy and efficient is determined *not* at the time of dismissal, but at the time when the Plaintiffs initially selected their forum. *Henry v. Metro. Dade County*, 329 F.2d 780, 781 (5th Cir. 1964); *Klotz v. Consol. Edison Co. of New York*, 386 F. Supp. 577, 586-87 (S.D.N.Y. 1974) (stating, *inter alia*, that "[t]he availability of a direct action for a declaratory judgment in the state courts is sufficient to satisfy the requirement for a plain, speedy and efficient state remedy…"); *Preston County Light & Power Co. v. Pub. Serv. Comm'n*, 297 F. Supp. 759, 766 (D. W.Va. 1969).

If the Johnson Act requires dismissal, any delay that results is the result of Plaintiffs' own mistake in seeking a remedy that this Court is jurisdictionally prohibited from granting.

Finally, Plaintiffs' entire "speed[]" discussion is ultimately premised on supposition. Based entirely on the *Wilson* litigation currently pending in Jefferson County Circuit Court, (*see* Doc. # 79 at 9-11), Plaintiffs assert that a suit in state court would be plagued by a "virtually certain" mass-recusal of the entire Jefferson County bench. But Plaintiffs are asking the Court to pile inference on top of inference: If Plaintiffs file suit, the judges *might* recuse en masse; if the judges recuse en masse, Chief Justice Cobb *might* unduly delay in choosing an alternate judge; once she makes her selection, the alternate judge *might* have to recuse; etc. There is no reason to believe that Plaintiffs' parade of horribles would materialize. For starters, even assuming a mass recusal, Amendment 328 to the Alabama Constitution provides a process by which the Chief Justice selects alternate judges. The Amendment's existence (combined with the presumption of regularity) is evidence that a mass recusal would not cause undue delay – there is already a plain, speedy, and efficient state-law remedy in place to address even Plaintiffs' worst-case scenario. Moreover, there are literally hundreds of state court judges to whom Chief Justice Cobb could turn. This case is quite unlike *Wilson* in that respect. *Wilson* is a putative class action, which presumptively gives every class member a direct pecuniary interest in the outcome and requires judges to be especially sensitive to issues that could lead to recusal or disqualification. As a non-class action, this case does not present the same recusal conundrum.

C. Plaintiffs' Reliance On The Inapposite *Warrenville State Bank* Case Is Telling.

As we have shown, Plaintiffs have studiously avoided the Eleventh Circuit's decisions in *Carlin* and *Marshall County*, which (along with on-point precedent from the Second, Eighth, Ninth, and Tenth Circuits) make clear that the Johnson Act broadly prohibits federal courts from

awarding relief that would affect, either directly or indirectly, any rate order. *See supra* at 2-6. It is instructive to see what Plaintiffs interpose against that mass of authority. At the March 25 hearing, the following colloquy occurred:

Plaintiffs' Counsel:	"Your Honor, there are dozens of cases in which a federal court has appointed a receiver. And the fact that the receiver takes over the county's –"
The Court:	"Any cases you know where a federal court appointed a receiver to affect rates and that was upheld by a court of appeals?"
Plaintiffs' Counsel:	"Your Honor, I don't have a direct answer to that, but we would love to look."
The Court:	"I'm going to give you that chance."
Plaintiffs' Counsel:	"Yes, sir."
The Court:	"And I'm not going to make you do it by the end of the hearing. I'm going to give you some more time than that."

(Tr. of 3/25 Hearing at 20-21). Now, having searched for two weeks, Plaintiffs point to *Warrenville State Bank v. Farmington Township*, 185 F.2d 260 (6th Cir. 1950). As Plaintiffs concede, however, neither the District Court nor the Sixth Circuit – nor even the parties, apparently – so much as *mentioned* the Johnson Act in the *Warrenville State Bank* proceedings. The District Court and Sixth Circuit opinions are silent with respect to the Act – not a word. Accordingly, the case is of negligible value; at most, Plaintiffs can speculate on how the courts *might* have ruled if the Johnson Act *had* been considered.

As matters stand, therefore, having taken this Court's invitation, Plaintiffs have been unable to locate a single case in which a federal court appointed a ratemaking receiver in the face of a Johnson Act objection and was affirmed on appeal. According to Plaintiffs' own research, if this Court appoints a ratemaking receiver over Jefferson County and that decision is affirmed on appeal – doubtful in light of *Carlin* and *Marshall County* – it will be a first.

II. If This Court Has Jurisdiction to Entertain Any Aspect of Plaintiffs' Request for Relief, It Should Abstain In The Interest of Federalism And Comity.

Plaintiffs have no meaningful response to the County's abstention argument. The County will respond briefly to Plaintiffs' three points addressed to *Thibodaux* abstention. As to *Burford* and *Williams*, the County is content to rest on its earlier briefing. (S*ee* Doc. # 77 at 11-18).

A. This Is The Sort of Extraordinary Case For Which *Thibodaux* Abstention Was Designed.

It is ironic that Plaintiffs would lead off their argument by pointing out that abstention is an extraordinary step, given that it is Plaintiffs who have invoked this Court's authority to grant them truly extraordinary emergency relief. Irony aside, the County does not deny that "abstention … is the exception, not the rule." *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 813 (1976). This, however, is an "exception[al]" case. Plaintiffs' requested relief implicates a number of unsettled questions of state law – questions that bear directly on Alabama's constitutional structure and the relationship between Jefferson County and the rest of the State. In these unique circumstances, the Court would be well within its discretion to defer to Alabama's courts. As Justice Kennedy has observed, "[a]bstention doctrines are a significant contribution to the theory of federalism and to the preservation of the federal system in practice. They allow federal courts to give appropriate and necessary recognition to the role and authority of the States." *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 733 (1996) (Kennedy, J., concurring). Accordingly, "[t]he duty to take these considerations into account *must* inform the exercise of federal jurisdiction." *Id.* (emphasis added).

What "ultimately" drives the abstention doctrines is a balancing of state and federal interests. Following "a careful consideration of the federal interests in retaining jurisdiction over the dispute and the competing concern for the 'independence of state action,'" the reviewing court must inquire whether "the State's interests are paramount [such] that a dispute would best

be adjudicated in a state forum." *Id.* at 728 (majority opinion) (citation and internal quotations omitted). "This equitable decision balances the strong federal interest in having certain classes of cases, and certain federal rights, adjudicated in federal court, against the State's interests in maintaining uniformity in the treatment of an essentially local problem, and retaining local control over difficult questions of state law bearing on policy problems of substantial public import." *Id.* (citations and internal quotations omitted). The "balance" tips decisively in favor of abstention here. There are no "federal rights" at issue here, nor is this case part of a "class[] of cases" that for some reason needs to be "adjudicated in federal court." *Id.* This is a pure diversity case. The federal interest is minimal at best. On the other side of the ledger, the State of Alabama has a strong interest in having "difficult questions of state law" decided by the state courts that are best equipped to decide them.

B. Plaintiffs' Distinctions of *Thibodaux* Are Meritless.

Plaintiffs attempt to distinguish *Thibodaux* on three bases. (*See* Doc. # 86 at 21.) None holds water.

First, Plaintiffs emphasize the fact that *Thibodaux* itself involved "an uninterpreted state law with a directly conflicting Attorney General opinion." (*Id.*) That was a circumstance of the case, to be sure, but we are not aware of any decision or commentary that purports to limit *Thibodaux* to its precise facts. The "conflict[]" to which Plaintiffs point was merely indicative of the "quandary" in which the *Thibodaux* District Court found itself concerning the meaning of Louisiana law. *Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25, 30 (1959).

Second, "and more importantly," Plaintiffs assert that *Thibodaux*'s rationale applies *only* to cases involving eminent domain, which Plaintiffs call a "distinct purview of the state." (Doc. #86 at 21.) But as we have already explained (*see* Doc. #77 at 4 n.1), that is incorrect. For starters, surely eminent domain is no more the "distinct purview of the state" than is the

assignment and distribution (per the State's founding charter) of regulatory responsibility between state and local governments. Moreover, the Supreme Court's own cases make clear that eminent domain is *not* the controlling criterion. In *County of Allegheny v. Frank Mashuda Co*., 360 U.S. 185 (1959), a case decided the same day as *Thibodaux*, the Court declined to require abstention in an eminent-domain case. Justice Stewart, one of only two Justices in the majority in both *Thibodaux* and *Mashuda*, explained the distinction:

> In *Mashuda* the Court holds that it was error for the District Court to dismiss the complaint. The Court further holds in that case that, since the controlling state law is clear and only factual issues need be resolved, there is no occasion in the interest of justice to refrain from prompt adjudication.

Thibodaux, 360 U.S. at 31 (Stewart, J., concurring). Accordingly, abstention under *Thibodaux* is appropriate where (1) the case is stayed rather than dismissed and (2) the underlying state law is unclear. The Supreme Court has specifically reaffirmed both of the distinctions drawn by Justice Stewart, citing his *Thibodaux* concurrence for support. *See Quackenbush*, 517 U.S. at 717 (observing that *Thibodaux* applies in "cases raising issues intimately involved with the States' sovereign prerogative, the proper adjudication of which might be impaired by unsettled questions of state law"); *id*. at 721 ("Unlike in *Thibodaux*, however, the District Court in [*Mashuda*] had not merely stayed adjudication of the federal action pending the resolution of an issue in state court, but rather had dismissed the federal action altogether. Based in large measure on this distinction, we reversed.") (punctuation, quotations, and citations omitted). Plaintiffs have not even engaged, let alone cast doubt on, that explanation.

Finally, Plaintiffs cite *Meredith v. Winter Haven*, 320 U.S. 228 (1943), and *McNeese v. Board of Education*, 373 U.S. 668 (1963), for the proposition that uncertainty in state law is not alone sufficient to justify *Thibodaux* abstention. But that move likewise misses the mark. *Thibodaux* itself acknowledged both *Meredith* and the uncontroversial proposition that Plaintiffs

advance here. *See Thibodaux*, 360 U.S. at 24-25 & n.2. The distinctions between *Thibodaux*, on the one hand, and *Meredith* and *McNeese*, on the other, are plenty. Most importantly, *Thibodaux* – like this case – involved not only uncertainty but also an important question involving "the apportionment of governmental powers between City and State." *Id.* at 28. The lesson of *Thibodaux*, *Meredith*, and *McNeese* is that uncertainly alone is not enough, but that "uncertainty plus" is. This case clearly involves the necessary "plus" factor – namely, several questions of Alabama constitutional law that determine how Jefferson County's vested authority over its sewer system relates to the sovereign prerogatives of the State.

Plaintiffs cannot bury *Thibodaux* either by noting random factual distinctions or by artificially limiting its scope. Subsequent Supreme Court precedent makes clear that *Thibodaux* applies – express "conflict[]" or not, eminent domain or not – "where there have been presented difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result of the case then at bar." *Colorado River*, 424 U.S. at 814 (emphasis added). Because the question whether a federal-court-appointed receiver can assume the sovereign functions of the Jefferson County Commission consistent with Amendment 73 of the Alabama Constitution is (1) "difficult," (2) "import[ant]," and (3) "transcend[ant]," *Thibodaux* abstention applies precisely.

C. There Are Unsettled Questions Of State Law That Particularly Relate To Alabama's Sovereign Prerogative.

Plaintiffs repeatedly assert that the state-law questions in this case are easy, clear, settled etc. (*see* Doc. # 86 at 21-22), but merely saying so does not make them so. The County has identified five distinct questions of state law that are unsettled and that implicate the fundamental

sovereign interests of Alabama – and in particular, the State's sovereign constitutional interest in assigning powers and duties to Jefferson County. (*See* Doc. # 72 at 13-16; Doc. # 77 at 5-10).[11]

Plaintiffs' scattershot efforts to paper over these difficulties are unpersuasive. First, Plaintiffs conclusorily assert – without any meaningful analysis – that "there is no limitation on Jefferson County's authority to delegate its power to a receiver." (Doc. # 86 at 22). But the Alabama Supreme Court has *never* opined on the question of delegation under Amendment 73. It does not obviously follow (as Plaintiffs suggest) from Amendment 73's grant of "full power and authority" that the Jefferson County Commission can delegate constitutional power in a contract without any legislative (to say nothing of constitutional) authorization. (*See* Doc. # 77 at 7-8) Amendment 73's grant is phrased in mandatory terms: "The governing body of Jefferson county *shall have* full power and authority …." ALA. CONST. amend 73 (emphasis added). Further, and in any event, Plaintiffs' argument cuts against the well-established principle that a legislative body cannot completely abdicate its legislative role by delegation. (*See* Doc. # 77 at 8-9 (citing *Birmingham v. Southern Bell Tel. & Tel. Co.*, 176 So. 301, 305 (Ala. 1937) (collecting state and federal cases)). Plaintiffs would set this Court adrift in uncharted delegation waters, without any meaningful guidance from the Alabama Supreme Court.

Of special note is the argument made in Plaintiffs' thirty-ninth footnote. Plaintiffs argue that *Jefferson County v. City of Leeds*, 675 So. 2d 353 (Ala. 1996), is "inapposite" because it involved "a judge reviewing the rate setting process of the Public Service Commission, with the court ultimately setting rates." (Doc. # 86 at 22 n.39). But *City of Leeds* did not involve any rate set by the Public Service Commission. Instead, the only rates discussed there were set (as they are here) by the Jefferson County Commission. 675 So. 2d at 354. The Alabama Supreme Court

[11] Further, the County has explained that these unsettled questions exist whether ratemaking is expressly at issue or not. (*See* Initial Brief at 19-22).

held that it had no power to direct the County Commission to impose any specific rate. *Id.* at 355. Instead of helping Plaintiffs, *City of Leeds* cuts decisively against them.[12]

D. The County Did Not Waive The Abstention Issue.

Plaintiffs repeatedly assert – without any foundation whatsoever – that the County dreamed up abstention as a "delaying tactic." (Doc. # 86 at 26) But, again, it was Plaintiffs – not the County – who picked this forum; again, they must take the forum as they find it. By seeking a remedy that implicates serious unsettled questions of state law, Plaintiffs brought abstention into sharp focus. Had they filed in state court, these problems would not have arisen.

In any event, Plaintiffs' suggestion of waiver is baseless. The County asserted back in November 2008 that abstention was appropriate. (*See* Doc. # 30 at ¶¶ 13-15, 18). The fact that the County raised abstention before the Court held a hearing on Plaintiffs' Emergency Motion is a sufficient basis for finding that the County's abstention arguments are not too "belated" to be considered on their merits.[13]

Finally, Plaintiffs argue that the Court has "exercised its jurisdiction to the full." (Doc. # 86 at 26). And to be sure, the Court's jurisdiction accepted pleadings, supervised limited discovery, and appointed Special Masters. None of these exercises of jurisdiction even remotely raises an abstention problem. It is the next step – Plaintiffs' request that the Court take the extraordinary step of appointing a receiver to superintend the County's constitutionally-assigned functions despite the lack of guiding state law – that brings the abstention issue to the fore. The

[12] It is also ironic – and telling – that Plaintiffs are left to cite cases from *other jurisdictions* to argue that *Alabama* law is easy, clear, and settled. (Doc. # 86 at 86 n.22).

[13] The *Hostetter* case cited by Plaintiffs is way off-point. Neither party had requested abstention in that case. *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 329 (1964). Indeed, in the proceedings below, "*both parties* urge[d] that [the court] should not abstain." *Idlewild Bon Voyage Liquor Corp. v. Epstein*, 212 F. Supp. 376, 381 (S.D.N.Y. 1962) (emphasis added).

fact that the County has put the abstention to the Court before the abstention-triggering step has been taken is proof that the County raised abstention soon enough. There is no waiver here.

III. The County Has Not Contended – Or Even Suggested – That The Indenture Is Unenforceable.

In arguing that ruling against them would render the Indenture unenforceable – with dire consequences for all, including the municipal bond market in general – Plaintiffs are tilting at windmills.[14] (*See* Doc. 86 at 42). The County does not contend that the Indenture is unenforceable – only that Plaintiffs are not entitled to the relief they seek from *this* Court at *this* time. If this Court denies Plaintiffs their emergency receiver – either on Johnson Act grounds or on the merits – the municipal bond market will keep ticking along just fine.

It is Plaintiffs, not the County, who would read out of the Indenture certain limitations that they find inconvenient, and indeed they urge the Court to enforce the Indenture not just on its plain terms but also "in accordance … with the expectations of the Warrantholders." These amorphous "expectations of Warrantholders" may explain, for example, why Plaintiffs omit from their quotation of Section 13.2(c) – the "strict right" passage – the limitation that a receiver is available only "upon the order of any court of competent jurisdiction." (*Compare* Doc. # 86 at 42 *with* Ex. 2, Sec. 13.2(c)). In other words, the Indenture does not automatically grant a receiver if there are continuing Events of Default; rather, Plaintiffs must prove their entitlement and secure the order of a court "of competent jurisdiction." Their decision to file in federal court despite the Johnson Act and abstention-based obstacles has brought to the fore the importance of this phrase. Similarly, Plaintiffs frequently read over the limitation in section 12.5(b) that the County's obligation to "make … increases and other changes in [sewer] rates and charges" is

[14] Jefferson County's sewer warrants are a hair on the tail of the municipal bond market dog. For an indication as to which side of this case has had the bigger impact on the municipal bond market, the Court need only consider that the Bond Insurers' ratings were downgraded almost a month before any ratings action on Jefferson County's Sewer Warrants. (Doc. # 75 at ¶¶ 128-153).

limited "to the extent permitted by law." Under Alabama law, which permits the Jefferson County Commission to impose only such rates and charges for sewer service as are "reasonable and nondiscriminatory," this limitation is important. Ultimately, an Alabama court will decide the contours of that limit. Plaintiffs apparently would read that limit, through the lens of "the expectations of Warrantholders," to mean "whatever is necessary to pay debt service."

But the key point is this: A denial of Plaintiffs' Emergency Motion does not mean that receivership is never an available remedy. The County has raised valid legal defenses to Plaintiffs' effort to have a *federal court* appoint on an *emergency* basis a receiver who would supplant the constitutionally-vested authority of the Jefferson County Commission. The County's position thus falls well short of an assertion the Indenture's receivership provision is unenforceable. The County's defense is based on the law, the limited authority of this Court sitting in diversity, the particular procedural posture of this case, and the extraordinary powers Plaintiffs would have the court vest in the receiver.

IV. Plaintiffs' Evidence Does Not Satisfy The Federal Receivership Standard.

The County will stand on its earlier briefs with regard to the application of the evidence to the federal standard for appointing an interim receiver. It is worth noting, however, that Plaintiffs gave this standard scant attention in their post-hearing brief. What little Plaintiffs say about the crucial threshold element of immediate and irreparable harm, however, demonstrates that their case, and the receiver they say they must have, is *all* about raising rates. (*See* Doc. # 86 at 26 ("Revenue enhancements are a key component to resolving this crisis…."), 38 ("[T]he receiver will provide expertise in rate-setting.") & 46 ("The County continues to refuse to implement the Special Masters' recommendations regarding revenue enhancements, including a

recommendation to increase rates by 25%.")).[15] Of course, this same focus on a ratemaking receiver puts Plaintiffs squarely in the crosshairs of the Johnson Act. (*See supra* at 2-14). Perhaps the real "irreparable harm" of which Plaintiffs complain is the alleged "dysfunction in the County Commission," the "significant rift" in the Commission, and the need for an "independent voice of reason." (Doc. # 86 at 38-39). But Commissioner Bell, speaking eloquently of the deliberative process, shows that Plaintiffs' complaints about the Commission are baseless:

> Individually as well as collectively I think [the members of the Jefferson County Commission] are all committed individuals who are knowledgeable about the situation. We may differ on the approach to what the solutions may be, but I think at the end of the day when the County Commission comes together and vote, the Commission speaks with one voice. I've always maintained both when I was with the city as will as now that prior to a vote, it's individual elected officials that's talking, but once a vote is taken, then the Commission has spoken. Whether it's by 3-2, 4-1 or 5-0, the Commission has spoken.

(Tr. of 3/26 Hearing at 250). Plaintiffs can complain about how democracy works, but their argument goes to the core of representative democracy. Government by people who are "free of political persuasion" (Doc. # 86 at 39) is not representative democracy.

The County offers these additional points: First, Plaintiffs argue that what's past is prologue concerning the County's experience with sewer consultants, and that the County's current efforts to comply with the Special Masters' report by commissioning a cost study should be discounted. This position ignores the fact that the Special Masters specifically recommended that a cost study be performed to determine whether "15% represents the appropriate level of the [residential customer] discount" (Ex. 47 at 31) and to address the fact that the Red Oak cost study, now two years old, did not consider the current situation. (*Id.* at 46-47). The County

[15] The County respectfully submits that the Special Masters' report contains no specific recommendation as to what rate increase, if any, would be appropriate at this time. The report recommends only that "any increase in customer charges should not initially exceed 25%." (*See* Ex. 47 at 45). Plaintiffs read this statement as an affirmative recommendation to implement a 25% increase in rates, now. The report does not support their reading.

Commission's decision to use an updated cost study to determine the appropriate level of some of the Masters' recommended revenue enhancements is sound fiscal management, not a dodge. Indeed, the skill and diligence of the County's Environmental Services Department was been recently recognized. The ESD received an award for its "operational excellence."[16]

Second, Plaintiffs' argument that the County should have slavishly implemented each of the consultants' recommendations from 2002-2007 misses a crucial, undisputed fact: as even Plaintiffs agree, until June 2, 2008, the County was charging sufficient rates, was fully servicing its debt from the net revenues of the sewer system, and was otherwise in compliance with the Indenture. (*See* Ex. 61 at 160-161; Ex. 62 at 66-68; Ex. 63 at 99-100). If failure to follow these consultants' advice were a legitimate basis to seek an emergency receiver, Plaintiffs would have sued the County long ago.[17] They care only about the bottom line. Had the County contemporaneously implemented every jot and tittle of the earlier consultants' recommendations, and yet still come up short on debt service payments in 2008 (as Plaintiffs implicitly concede it would have, *see* Doc. # 86 at 36 n.56), would the Plaintiffs have conceded that following those recommendations was a defense to the appointment of a receiver?

Third, it is premature for the Court to decide, as Plaintiffs urge it to do, that the County's "unclean hands" defense is defective: The March 26 hearing was not a final hearing on the merits. Because it is acting at the behest of the Bond Insurers, the Trustee is tarred with the same brush. The Trustee represents all Warrantholders, including the Bond Insurers. Not all the Warrantholders are as "innocent" as the Trustee claims. The Trustee cannot escape the Bond

[16] A copy of a newspaper report discussing the award is attached as Appendix 1.

[17] A close reading of the earlier consultants' reports makes plain that each of them relied on projections regarding future costs and expenses, among other projections, and that some of those projections widely missed the mark. Mr. Denard testified to this effect with regard to the work done by Mr. Krebs in 2003, for example. (Tr. of 3/26 Hearing at 154-155). The alleged "failure" immediately to implement the advice of consultants is therefore not a good indicator of whether the County today is capable of running the sewer system competently.

Insurers' unclean hands, especially since it appears that pursuing a receiver was the Bond Insurers' idea in the first place. (*See* Ex. 87). Moreover, the timing of the Bond Insurers' downgrades and the first negative experiences with the County's sewer warrants is illuminating. FGIC's ratings were downgraded by Moody's, Standard & Poor's, and Fitch Ratings, and Syncora's ratings were downgraded by Moody's and Fitch, *before* any downgrade of the County's Warrants. (Doc. # 75 at ¶¶ 129, 133, 135, 138, 142, 146). No auction for any Jefferson County auction rate sewer warrant had ever failed, and no Jefferson County variable rate demand sewer warrant had ever been optionally tendered, before the initial downgrades of the Bond Insurers in January 2008. (Doc. # 75 at ¶¶ 133, 138, 142; Doc. # 32 at ¶¶ 228-247; 248-259).[18] Several such auctions did fail, however, between the January 2008 downgrades of the Bond Insurers and the first downgrade of the Jefferson County Sewer Warrants on February 22, 2008. (Doc. # 75 at ¶¶ 129, 133, 135, 138, 142, 146; Doc. # 32 at ¶¶ 232-33, 237, 241, 244-45). And most of the optional tenders of Jefferson County variable rate demand sewer warrants occurred between the January 2008 downgrades of the Bond Insurers and the first downgrade of the Jefferson County Sewer Warrants on February 22, 2008. (Doc. # 75 at ¶¶ 129, 133, 135, 138, 142, 146; Doc. # 32 at ¶¶ 249-252, 255-56, 258-59).

V. If Plaintiffs Want An Emergency Receiver, They Will Have To Post A Bond.

The County will rely on its previous discussion of the applicable law showing that both Plaintiffs and any appointed receiver must post a bond in the event a receivership is ordered. (*See* Doc. # 72 at 27-29). The County will respond, however, to Plaintiffs' argument that a bond would be unnecessary if the Court appoints John Young as the receiver. The fact (to which all agree) that John Young has done a good job as Special Master is irrelevant to the analysis of

[18] Although this reference to the parties' Joint Statement from November 2008 cites to paragraphs that Plaintiffs did not agree to (for lack of sufficient information), the Court can consider the facts in these paragraphs as a proffer of the evidence that the County would introduce at trial.

whether his actions as receiver might expose the County to potential liability requiring a bond. Even a non-ratemaking receiver would potentially expose the County to liability by his actions. For example, one or more disgruntled sewer system employees, unhappy with how Mr. Young (as receiver) managed the system's workforce, might sue *the County* for allegedly circumventing the Personnel Board, or for blurring job classifications and requirements, or any other employment law cause of action. Or, if Mr. Young (as receiver) chose to deplete the system's cash and capital reserves for debt service, thereby bringing the County's into violation of the Consent Decree or the Clean Water Act, the federal EPA might once again sue *Jefferson County*.[19] No matter the merits of such suits, and no matter Mr. Young's good intentions and laudable efforts, the end result would be the same: his actions (indeed, any receiver's actions) would create potential liabilities for the County. If an emergency receivership is ordered, and the County is thereby divested of control over any of the operations of the sewer system, the County must have some protection against the lawsuits that would inevitably follow.

Completely apart from the analysis of the bond Mr. Young would have to post, Plaintiffs cite no authority stating why *they* should not be required to post a bond to protect the County against the possibility that any order appointing an emergency receiver would be negated by a final judgment in favor of the County or reversed on appeal. The County has several strong defenses to the final appointment of a ratemaking receiver, even without considering the Johnson Act and the County's counterclaims. Even if this Court were to appoint an emergency receiver, the County is still likely to succeed at trial and there is at least a substantial chance that the Eleventh Circuit would take an adverse view on the Johnson Act. Requiring Plaintiffs to post a bond – a bond commensurate with the value of the powers they seek to vest in an emergency

[19] This is no mere hypothetical. A Syncora representative testified last fall that Syncora would accept a receiver who could decide to use all the sewer system's money for debt service instead of using the money to fix and maintain the sewer system's infrastructure. (*See* Ex. 62, at pp. 105-07).

receiver – is necessary to protect the County against the chance that a receiver would do significant damage to the County in the time before a final judgment can be rendered or an appellate mandate handed down.

VI. Plaintiffs' "Events Of Default" Arguments Are Irrelevant At This Stage Of The Proceeding And Are Weak, In Any Event.

Plaintiffs alleged various Events of Default during the March 26 hearing. In its post-hearing brief, the County addressed Plaintiffs' various claims and showed how they were disputed by the Commission. (*See* Initial Brief at 13-19). Plaintiffs have not raised anything in their post-hearing brief that alters the County's position.

One item of note, however, is Plaintiffs' assertion in its post-hearing brief that "Defendants' argument that the Warrants held by the Insurers are not Bank Warrants is a red herring." (Doc. # 86 at 30). The *only* reason the County has even addressed whether the securities held by the Insurers are or are not Bank Warrants is because the Insurers have raised that claim on numerous occasions and, indeed, have made it a basis of their payment-default arguments. (*See, e.g.*, Doc. # 75 at ¶¶ 156-158; Doc. # 32 at ¶¶ 267, 270, 272, 276, 279; Doc. # 33 at ¶¶ 5, 7-8; Doc. # 34 at 5-6; Doc. # 74 at 2-3; Doc. # 86 at 30 n.46).

To the extent distractions are being proffered, they are from the Plaintiffs. Plaintiffs continue to peddle meritless arguments. For example, Plaintiffs contend that the Bond Insurers' own junk ratings constitute a default by the County. (*See* Doc. # 86 at 28). In the same way, Plaintiffs maintain that the County is in default because it did not apply funds beyond the lien of the Indenture to satisfy obligations limited to net sewer revenues (*see id.*) – criticizing the County for not invading Indigent Care Tax proceeds to pay off the Bond Insurers – despite testimony from their own expert that all investment decisions were made "with full knowledge of the fact that [investors] would have no claim on any revenues of the County other than those

derived from the operation of the sewer system." (Tr. of 3/26 Hearing at 121). The Court should not be misled.

CONCLUSION

For these reasons, the County requests that the Court deny Plaintiffs' emergency motion.

Respectfully submitted this 15th day of April, 2009.

s/ Joseph B. Mays, Jr.
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CERTIFICATE OF SERVICE

I hereby certify that on April 15, 2009, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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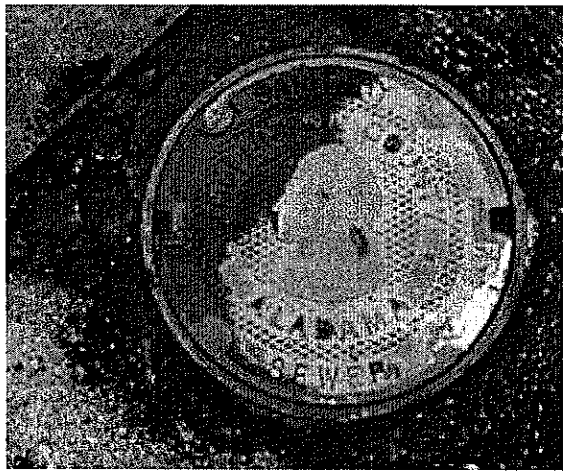
APPENDIX 1

Financially troubled Jefferson County sewer system wins honor for treatment plant operation

Posted by jamacdonald April 15, 2009 12:43PM

Jefferson County, Alabama, has gotten anything but plaudits over its sewer operation, but now it has something to crow about.



With the threat of receivership and bankruptcy looming, the county will be recognized Monday as having some of the best run waste water treatment plants in the state. The award is for the operational excellence of the county's Trussville, Turkey Creek and Village Creek waste water treatment plants.

The award is from the Alabama Water Enviroment Association, a nonprofit professional organization for engineers and utilities in the environmental industry.

The county was judged on such criteria as safety, employee training, permit compliance and record keeping. "This just reaffirms that we're doing a good job in operating our system," said Daniel White, deputy environmental services director.

Plant supervisors will travel to Orange Beach to collect the award at the association's conference.

Categories: